

FIRST DIVISION  
DATE: March 24, 2014

No. 1-12-0656

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 18207
	)	
HUGHEST GIBSON,	)	Honorable
	)	Shelley Sutker-Dermer,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HOFFMAN delivered the judgment of the court.  
Presiding Justice Connors and Justice Delort concurred in the judgment.

**O R D E R**

¶ 1 **Held:** Order summarily dismissing defendant's section 2-1401 petition for relief from judgment, which was recharacterized as a post-conviction petition, reversed due to circuit court's failure to properly admonish defendant; cause remanded for compliance with those admonitions; fines and fees order corrected.

¶ 2 Defendant Hughest Gibson appeals from the summary dismissal of his *pro se* section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2010)), which the circuit court recharacterized as a petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et. seq.* (West 2010)). On appeal, defendant contends that the circuit court erred in failing to provide him with the requisite admonitions prior to recharacterizing his petition, and requests that we vacate the court's order and remand his cause for compliance with the proper

admonishments. Defendant also contends that one of his two convictions for aggravated battery of a peace officer must be vacated because it violates the one-act, one-crime doctrine, and that the imposition of the DNA analysis fee was improper and should be vacated.

¶ 3 Defendant was charged with, *inter alia*, two counts of aggravated battery of a peace officer in relation to events that transpired at the police station following his arrest on drug-related charges the evening of September 8, 2009, in Chicago, Illinois. In one count, he was charged with causing bodily harm to Chicago police officer Hitesh Patel by kicking him about the body, and in the other count he was charged with making physical contact of an insulting or provoking nature by kicking Officer Patel about the body.

¶ 4 At defendant's bench trial, Officer Patel testified, *inter alia*, that on the night of the incident, he announced his office to defendant at the arrest scene and was wearing his star affixed to his duty belt. While conducting a custodial search of defendant and affixing him to the prisoner bench at the police station, defendant became irate. Officer Patel further testified that defendant screamed, "[u]ncuff me. I'll bust you in your head," then leaned back and kicked him in his right knee, causing Officer Patel to lose his balance and fall down. He did not sustain a visible injury, but felt a sharp pain in his knee and felt provoked and insulted as a result of being kicked by defendant.

¶ 5 Defendant was found guilty of two counts of aggravated battery of a peace officer, and sentenced to concurrent, respective terms of six years' imprisonment. After sentencing and the expiration of time for challenging his conviction and sentence, defendant filed numerous *pro se* motions attempting to extend the time for filing an appeal, all of which were denied. On December 21, 2011, defendant filed a *pro se* section 2-1401 petition for relief from judgment, in which he argued that his due process rights were violated by the State's use of false testimony,

that Officer Patel advanced perjured testimony, that he was not proven guilty beyond a reasonable doubt, and that he received ineffective assistance of counsel.

¶ 6 The circuit court ruled on his petition on January 24, 2012, noting that it had "received a letter from [defendant] regarding post-conviction," and that it had "review[ed] [defendant's] post-conviction petition." The circuit court summarily dismissed the petition, finding that it was frivolous and patently without merit.

¶ 7 On appeal, defendant first contends that the trial court erred in failing to give him the requisite admonishments prior to recharacterizing his section 2-1401 petition for relief from judgment as a post-conviction petition. The State agrees that the circuit court failed to properly admonish defendant of the recharacterization of his petition under *Shellstrom-Pearson*, and that the cause must be remanded for compliance with that ruling.

¶ 8 In *People v. Shellstrom*, 216 Ill. 2d 45, 57 (2005), the supreme court held that when a circuit court recharacterizes a pleading as a first post-conviction petition, "the circuit court must (1) notify the *pro se* litigant that the court intends to recharacterize the pleading, (2) warn the litigant that this recharacterization means that any subsequent postconviction petition will be subject to the restrictions on successive postconviction petitions, and (3) provide the litigant an opportunity to withdraw the pleading or to amend it so that it contains all the claims appropriate to a postconviction petition that the litigant believes he or she has." In *People v. Pearson*, 216 Ill. 2d 58, 68 (2005), the supreme court applied the *Shellstrom* rationale to situations where the circuit court recharacterizes a pleading as a successive post-conviction petition.

¶ 9 The record here shows that the circuit court failed to give defendant the requisite admonishments prior to recharacterizing his section 2-1401 petition as a post-conviction petition.

Accordingly, we vacate the circuit court's dismissal of defendant's petition and remand this cause for compliance with the *Shellstrom-Pearson* admonishments. *Shellstrom*, 216 Ill. 2d at 58.

¶ 10 Defendant next contends that his two convictions for aggravated battery to a peace officer violate the one-act, one-crime doctrine because they are both based on one physical act of kicking Officer Patel a single time. Defendant acknowledges that he failed to include this claim in his section 2-1401 petition, but maintains that we may nevertheless review it because a conviction that violates the one-act, one-crime doctrine is void and may be attacked at any time. The State responds that defendant's sentences for two counts of aggravated battery of a peace officer were merely voidable, and thus not subject to collateral attack.

¶ 11 The State also maintains that there is no need for this court to address this issue because this cause is being remanded and defendant will have an opportunity to amend his pleading to include this issue after being properly admonished pursuant to *Shellstrom-Pearson*. We agree, and find that resolution consistent with *Shellstrom-Pearson* in that, upon remand and the giving of proper admonishments, defendant may be afforded the opportunity to include this claim in his post-conviction petition. See *e.g.*, *People v. Cowart*, 389 Ill. App. 3d 1046, 1050 (2009) (recognizing that a violation of the one-act, one-crime principle also violates the constitutional protection against double jeopardy and may be raised in a post-conviction petition).

¶ 12 Finally, we agree with the parties that defendant was erroneously assessed a \$200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2010)), because his DNA profile was entered into the Illinois State DNA database in September 2005 for a prior conviction. *People v. Marshall*, 242 Ill. 2d 285, 301-03 (2011). We therefore order this fee vacated and the fines and fees order corrected to reflect this decision.

¶ 13 For the foregoing reasons, we vacate the \$200 DNA analysis fee, and reverse the summary dismissal order, and remand this cause to the circuit court for further proceedings in accordance with *Shellstrom-Pearson*.

¶ 14 Reversed and remanded with directions; fines and fees order corrected.